**Ogihara America Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.** Cases 7–CA–47071 and 7–RC–22589

November 30, 2004

## DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 12, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Ogihara America Corporation, Howell, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the notice of second election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO.

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[1] The judge found, inter alia, that the Respondent violated Sec. 8(a)(3) and (1) of the Act when, during the preelection "critical period," it issued employee Stefan Mikulka a written warning for distributing union literature in a nonworking area on nonworking time to an employee who was also on nonworking time. The warning also stated, however, that Mikulka had violated the Respondent's "Rule 4," which prohibits the posting of unapproved material. The Respondent acknowledged that the wrong rule was cited, and did not except to the 8(a)(3) violation finding.

The election was held on January 9, 2003. After the withdrawal of determinative challenges, a revised tally of ballots issued, showing 148 votes for and 159 against representation by the Petitioner. The judge found, and we agree, that the critical-period 8(a)(3) violation warrants setting aside the election. In adopting the judge's finding that Mikulka's discipline constituted objectionable conduct, we rely on the fact that Mikulka was disciplined for protected conduct, and not on the fact that the written warning inadvertently cited the wrong rule of workplace conduct.

The judge also found objectionable the Respondent's enforcement, on the day of the election, of its policy concerning employee uniforms. The Respondent excepts. Because we have found that Mikulka's unlawful discipline is independently sufficient to warrant a rerun election, we find it unnecessary to pass on whether the Respondent's enforcement of its uniform policy was also objectionable.

In setting aside the election based on the unlawful discipline of Mikulka, the judge relied on *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Chairman Battista finds that the Respondent's unlawful conduct would warrant a new election even under the standard set forth in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995), because that conduct had "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." Accordingly, the Chairman finds it unnecessary to pass on *Dal-Tex* or its progeny holding that an unfair labor practice will warrant setting aside an election except where "it is virtually impossible to conclude that the misconduct could have affected the election results." See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

Member Schaumber concurs in the result his colleagues reach and agrees with the Chairman's comments above. Additionally, because the Respondent has not excepted to the Sec. 8(a)(3) violation found by the judge, Member Schaumber finds it unnecessary to address the merits of the judge's discussion of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

[2] We shall substitute a new notice that accords with the language of the judge's recommended Order and with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. November 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with your right to distribute protected union literature in nonworking areas when neither you nor the recipient is on working time.

WE WILL NOT discipline you for distributing literature in nonworking areas on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, when neither you nor the recipient is on working time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE HAVE rescinded the unlawful discipline that we issued to Stefan Mikulka, and we will not use that discipline against him in any way.

## OGIHARA AMERICA CORPORATION

*Mary Beth Foy, Esq.*, for the General Counsel.
*A. David Mikesell* and *Aaron D. Graves, Esqs.*, for the Respondent.
Betsy A. Engel, Esq., for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 25, 2004, pursuant to a complaint that issued on April 6, 2004.[1] The complaint alleges two violations of Section 8(a)(1) of the National Labor Relations Act and the unlawful discipline of employee Stefan Mikulka in violation of Section 8(a)(1) and (3) of the Act. On April 6, contemporaneously with the issuance of the complaint, the Regional Director issued an order that directed a hearing on objections in Case 7–RC–22589 and consolidated that case for hearing with the unfair labor practice case. The Respondent's answer denies all violations of the Act. I find that the Respondent's interference with its employees' distribution of literature and the discipline of Mikulka did violate the Act as alleged in the complaint. I find also that the Employer engaged in objectionable conduct and that a new election must be held.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, Ogihara America Corporation, the Company or the Employer, is a corporation engaged in the manufacture and nonretail sale of automobile parts at its facility in Howell, Michigan. The Company, in conducting its business, annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. The Company admits, and I find and conclude,

[1] All dates are in 2004 unless otherwise indicated. The charge in Case 7–CA–47071 was filed on January 21.

that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. Background*

Following the December 15, 2003, filing of the representation petition in Case 7–RC–22589, the Employer and the Union entered into a stipulated election agreement that was approved by the Regional Director of Region 7 on December 23, 2003. There were approximately 323 employees in the stipulated appropriate unit.[2] Thereafter, on January 9, an election was conducted. The Union received 148 votes, 150 employees voted not to be represented by the Union, and the Union challenged 9 ballots. A revised tally, following the withdrawal of the Union's challenges reflected 159 votes against representation by the Union. The Union filed objections to the election and the unfair labor practice charge alleging, inter alia, that the Respondent had illegally disciplined employee Stefan Mikulka.

The Company permits solicitation and distribution before and after work and when employees are on break. Executive Manager of Human Resources Patrick Casady testified that these activities are limited to nonworking time. Although testimony suggests that the foregoing practice is reflected in a written rule, Rule 31, no document reflecting that rule was introduced into evidence. There is no allegation that the Company maintains or enforces an invalid rule.

Stefan Mikulka was disciplined on December 16, 2003. The discipline was rescinded on February 16. The Company refers to its employees as associates. Although the memorandum rescinding the discipline refers to Mikulka having been disciplined for "distribution of literature during work time," the disciplinary notice issued to Mikulka states that he "was seen distributing a letter titled 'Sometimes we need to remember' to another Associate in the building."

[2] The appropriate unit is: All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 1480 West McPherson Park Drive, Howell, Michigan, including the following classifications: calibration technician, CMM operator, die finisher, material handling driver, layout tech, plant maintenance associate, press maintenance associate, material handling production associate, production planning production associate, production associate APQP, press production associate, assembly production associate, quality production associate, quality specialist APQP, customer quality specialist, data quality specialist, ultrasonic quality specialist, receiving administrator, APQP technician, tool & die assistant, production activity coordinator, assembly team leader, press team leader, production planning team leader, quality team leader, material handling team leader, plant maintenance team leader, and tool & die team leader; but excluding engineers, office clerical employees, MIS employees, guards and supervisors (including facilitators) as defined under the Act.

### *B. The Discipline of Stefan Mikulka*

#### 1. Facts

Stefan Mikulka was an active union adherent. He attended union meetings, distributed union literature, and spoke with employees regarding the Union. On December 8, 2003, Mikulka entered the breakroom at lunchbreak, about 11:30 a.m., cleared papers and trash from the table at which he then sat down, placed his sandwich upon a clean piece of paper upon which there was writing, and began playing cards with three of his fellow employees. As Mikulka was eating and playing cards, employee Wes Winnicki approached him. Mikulka could not recall whether Winnicki took the piece of paper that he was using as a placemat under his sandwich or whether he handed the paper to Winnicki. Executive Manager of Human Resources Casady testified that Stamping Manager Jeff Hughes reported that he observed Mikulka pass the paper to Winnicki. Winnicki departed from the breakroom with the piece of paper. Mikulka denied that he had read what was written on the paper that he was using as a placemat. Thereafter, employee Winnicki was observed distributing the paper that he had obtained from Mikulka to employees in another breakroom located near the shipping and receiving area of the plant.

Management officials met with Winnicki regarding his actions. Manager Casady testified that "we met with Wes Winnicki," but he did not name the other individual or individuals involved in the meeting. The only evidence of what occurred in that meeting comes from Casady who testified that Winnicki told him that he had "heard that there was a piece of paper down in the break area near the B line, . . . where Stefan [Mikulka] typically takes his break." Winnicki informed Casady that he went to that breakroom, obtained the document from Mikulka, and then "came back and distributed it to the people in the break area near . . . shipping and receiving." Winnicki also stated that Mikulka had "handed him the paper," and Manager Hughes informed Casady that he had seen Mikulka do so. Casady testified that it was decided to discipline Mikulka because of his active participation in the distribution and "our belief that Wes [Winnicki] was on working time." Contrary to the assertion in the Respondent's brief that "Winnicki was also understood to confirm that he was on work time," there is no evidence of any such confirmation by Winnicki. The only evidence relating to Winnicki's status is Casady's testimony of "our belief" that Winnicki was not on break because he had begun work at 5 a.m. rather than 6 a.m. Although Manager Jeff Hughes testified, he was not asked about, and did not address, any of the foregoing matters. Employee Wes Winnicki did not testify.

There is no evidence that the Company conducted any investigation to confirm its assumption that Winnicki was not on break. Confirmation of the absence of any such inquiry is established by Manager Casady's testimony that, in February, after learning that Winnicki contended that he was on lunchbreak, "I discussed it with his [Winnicki's] immediate facilitator just to confirm that that was possible, that he was on lunch at that time."

The paper obtained by Winnicki from Mikulka was a one page document with a heading, in boldface type, stating "Some-

times We Need to Remember" followed by three typed paragraphs containing a prounion message that refers to an antiunion article written by Manager Patrick Cassidy and published in an internal newsletter received by employees. The prounion response is signed "Concerned Associate." The formatting and contents of the typed document suggest that it was prepared for distribution in response to Cassidy's published remarks, and I so find.

On the morning of December 10, 2003, Mikulka was sent to the office of his supervisor, Facilitator Scott Thompson. Thompson informed Mikulka that Manager Casady wanted to speak with him about Rule 31 and that he "could be terminated for handing out literature." Mikulka denied handing out literature. Thompson did not testify, thus Mikulka's testimony regarding the foregoing statement is undenied. I credit Mikulka.

That afternoon, Mikulka met with Casady and Thompson in the plant conference room. Mikulka initially testified that Casady stated to him that he "was handing out literature," and that he responded that he "wasn't." When questioned by Counsel for the Charging Party, Mikulka revised his testimony and said that Casady asked if he had been handing out literature. I do not credit his revised testimony. Casady then showed Mikulka the "Sometimes we need to remember" document, asking whether he had seen the document. Mikulka responded that he had seen the document but that he did not know what it was. Casady asked whether Mikulka would be willing to write a statement regarding the incident. Mikulka asked when the incident had taken place and Casady answered "on December 8th 2003, 11:40 a.m." Mikulka stated that he was playing cards. He agreed to write a statement and did so on December 11, 2003. Contrary to Mikulka's denial, I find that he was aware of the nature of the document that he had placed under his sandwich. I find that he handed it to Winnicki.

On December 16, 2003, Mikulka was called to the office of his supervisor, Facilitator Thompson, and issued a written counseling. The offense for which Mikulka was disciplined was "distributing a letter titled 'Sometimes we need to remember' to another Associate in the building." There is no mention of working time in the discipline. The disciplinary notice states that Mikulka violated Rule 4, which prohibits "[p]osting material within the facility or grounds without . . . approval." Manager Casady acknowledged at the hearing that the cited rule on the notice was not the rule that Mikulka had allegedly violated: "the wrong rule was written down."

Employees heard that Mikulka had been disciplined for distributing literature. Mikulka discussed the discipline that he had received with numerous employees, eight of whom, William Horn, Bill Frech, Helen Heinz, Randy Warren. Derrick Bynum, Teraz Griffith, Denny Wilms, and Jeanine Ross, he recalled by name and others whom he did not recall by name. William Horn, who works second shift, heard about the discipline when he came into work and then spoke about it with Mikulka. Thereafter, he discussed the discipline with employees Vince Jenco and Bruce Slaughter. Horn testified that Mikulka's discipline was a topic of discussion at break. He explained, "It's [the plant is] a small town and talk runs rampant, good or bad." Bill Frech heard about the discipline in conversation at a break table. Andre (Andy) Ahern, who like Horn works on second shift, heard that Mikulka had been disciplined from first shift employee Ron Whittaker when he reported to work. He named two second-shift employees, Tom Griswold and Chris Simmons, who he knew had heard that Mikulka had been disciplined.

The Union filed timely objections to the election on January 16 and the charge alleging that Mikulka had been unlawfully disciplined on January 21. The Board initiated its investigation. In preparation for that investigation, Manager Casady spoke again with employee Wes Winnicki. In this conversation, Winnicki was assisted by employee Ryan Goetz. Casady testified that Winnicki has "a very thick [Polish] accent" and is "[s]ometimes difficult to understand." In their conversation, Casady "learned that Wes [Winnicki] was actually on lunch from 11:30 to noon." As already noted, Casady thereafter confirmed this with Winnicki's facilitator. On February 16, the discipline that had been issued to Mikulka was rescinded. Although the discipline issued to Mikulka did not refer to Winnicki purportedly being on working time, the rescission specifically states that the reason for the rescission was that Winnicki "was on his lunch break and not work time." It does not address whether, in the future, Mikulka would be expected to assure that any employee with whom he spoke in the breakroom was also on break. Casady testified that discipline had also been issued to Winnicki and that it too was rescinded. The record does not address the absence of any charge or allegation relating to Winnicki, who did not testify.

2. Analysis and Concluding Findings

The complaint, in subparagraph 7(a), alleges that, on December 8, 2003, Jeff Hughes and Scott Thompson interfered with employees' right to distribute protected literature. There is no evidence of interference with distribution by Hughes. Hughes did not intervene when he observed Mikulka hand the paper to Winnicki. Although Winnicki distributed the document in the shipping and receiving breakroom, there is no evidence of any interference in that distribution. I shall recommend that subparagraph 7(a) as it relates to Hughes be dismissed.

On December 10, 2003, Facilitator Thompson informed Mikulka that Manager Casady wanted to talk to him and that he "could be terminated for handing out literature." I find, as argued by the General Counsel, that the foregoing undenied comment, referring to possible termination for distribution with no exception for the time or place of any such distribution, interfered with Mikulka's right to distribute literature and violated Section 8(a)(1) of the Act as alleged in subparagraph 7(a) of the complaint. The minor discrepancy in the date, December 10 rather than December 8, 2003, is insufficient to establish any prejudice to the Respondent in responding to the foregoing allegation. *Parts Depot, Inc.*, 332 NLRB 733, 734 at fn. 6.

The complaint, in subparagraph 7(b), alleges that Thompson and Casady coercively interrogated employees about the distribution of protected union literature. Mikulka's testimony does not establish an unlawful coercive interrogation by either. Thompson informed Mikulka that Casady wanted to talk to him. At that meeting, Casady initiated the conversation by stating to Mikulka that he had been handing out literature, the ac-

cusation to which Mikulka was being given the opportunity to respond. When Mikulka denied having distributed anything, Casady showed him the document that he understood Mikulka had given to Winnicki and asked if he had seen it. Unlike the situation in *Con-Way Central Express*, 333 NLRB 1073 (2001), cited by the General Counsel, Casady was not seeking to determine the identity of the employee who had engaged in protected activity. Rather, the Respondent, properly, confronted Mikulka, who had already been identified, with the information it possessed and requested that he write a statement, which he did. "The failure to conduct a meaningful investigation or to give the employee an opportunity to explain has been regarded as an important indicia of discriminatory intent." *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). If the Respondent were to fairly investigate the alleged improper distribution, Mikulka had to be confronted with the accusation against him and given the opportunity to respond. There was no unlawful interrogation. The deficiency in the investigation was the failure to validate the assumption that Winnicki was not on break. I shall recommend that subparagraph 7(b) of the complaint be dismissed.

Subparagraph 7(c) of the complaint alleges that the Respondent disciplined employee Mikulka because of his distribution of union literature in violation of Section 8(a)(1) and (3) of the Act. The Respondent argues that it disciplined Mikulka based upon its good faith but admittedly mistaken belief that employee Winnicki was not on break. The evidence does not establish that the Respondent could reasonably have held such a good faith belief. No management official questioned either Winnicki or Winnicki's direct supervisor, his facilitator, regarding whether he had been on break in December, when the discipline was issued to Mikulka. Testimony by Casady that Winnicki is difficult to understand because of his Polish accent affords no legitimate excuse. Language proved to be no barrier when a full and complete investigation was conducted in connection with the unfair labor practice charge in February. In that investigation the Respondent learned that Winnicki contended he had been on break, and his facilitator confirmed "that that was possible, that he was on lunch at that time."

The Respondent's brief, although arguing that the rescission of Mikulka's discipline is evidence that it did not bear animus towards protected activity, acknowledges that "there was no effective repudiation under *Passavant Memorial [Area] Hospital*, 237 NLRB 138 (1978)." I do not agree that the rescission reflects an absence of animus on the part of the Respondent rather than an attempt to avoid liability for its unlawful actions. I agree that there was no effective repudiation. The rescission was untimely, and it was not "specific in nature to the coercive conduct." The rescission does not address the language of the warning received by Mikulka, which makes no mention of Winnicki or working time and states that Mikulka had been distributing "in the building." Nor does the rescission acknowledge that the rule cited in the discipline was inapplicable and cited in error. The rescission gives no assurance that, in the future, the Respondent would not interfere with the exercise of employee Section 7 rights. *United States Service Industries*, 324 NLRB 834, 837–838 (1997).

The Respondent concedes that the discipline issued to Mikulka was improper because Winnicki was on break but argues that the foregoing was a "technical violation." I do not agree. The warning Mikulka was given refers to "distributing . . . in the building." The document that Mikulka gave to Winnicki was a prounion response to an article by Manager Casady. If the Respondent, consistent with its contention that Winnicki was on working time, was seeking to have Mikulka comply with its rule, the discipline would have referred to working time. It did not. There is no reference to working time. The reference is to "distributing . . . in the building." Six days earlier, on December 10, 2003, Facilitator Thompson had told Mikulka that he could be terminated for distributing literature. The Respondent was seeking to put a stop to Mikulka's lawful distribution of prounion literature.

Notwithstanding the admission of a "technical violation," the Respondent argues that it did not discriminate against Mikulka because it acted upon its good faith belief that Mikulka engaged in unprotected conduct rather than upon antiunion animus. I have found that the Respondent could not have reasonably held a good faith belief when neither the employee supposedly not on break nor his supervisor were questioned regarding the employee's status. Even if I were to have found that the Respondent's belief that Winnicki was not on break was held in good faith, "[w]here an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur." *Keco Industries*, 306 NLRB 15,17 (1992).

The Respondent argues that the General Counsel failed to present a prima facie case of a Section 8(a)(3) violation because "there is no evidence of anti-Union animus on the part of Respondent." Contrary to the foregoing assertion, Facilitator Thompson's threat of termination to known union adherent, Mikulka for "distributing literature" establishes animus. More importantly, animus is an element of proof in those cases which turn on motivation and, therefore, require a *Wright Line* analysis. This is not a dual motive case. See *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000). Mikulka was disciplined for engaging in protected union activity that the Respondent mistakenly, and as I have found unreasonably, assumed occurred in violation of its distribution rule. As the Supreme Court stated in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." Unlawful discipline for engaging in protected union activity violates both Section 8(a)(1) and (3) of the Act. *Keco Industries*, supra at 19; see also *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001).

The conduct in which Mikulka engaged, distribution of prounion literature in a nonworking area on nonworking time to an employee who was also on nonworking time, constituted both union activity and protected Section 7 activity. In warning Mikulka for an offense that he did not commit, the Respondent violated Section 8(a)(1) and (3) of the Act.

*C. The Objections to the Election*

The Union filed objections to the election contending that the Employer:

> 1. Interfered with employees engaging in protected solicitation and distribution
> 2. Changed employer work rules to discourage union activity.
> 3. Engaged in reprisals for employees who engaged in union activity.
> 4. Disciplined employees who engaged in protected union activity.

I have found that, after the petition was filed on December 15, 2003, the Employer violated Section 8(a)(1) and (3) of the Act by unlawfully disciplining employee Mikulka for distributing protected union literature in a nonworking area on nonworking time to a fellow employee who was also on nonworking time. The foregoing finding is coextensive with the Union's Objections 1 and 4 in that the Employer's discipline of Mikulka concomitantly interfered with employees' protected right to distribute protected union literature.

The Board, in *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001), reaffirmed longstanding Board precedent regarding the effect of Section 8(a)(1) conduct in the context of an election:

> It is well settled that conduct in violation of Section 8(a)(1) that occurs during the critical period prior to an election is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). The Board has recognized a narrow exception to this rule for conduct that is so minimal or isolated that "it is virtually impossible to conclude that the misconduct could have affected the election results."

The Employer, in its brief, argues that the discipline of Mikulka had "no chilling effect." The Employer notes that all employees who testified at this proceeding, Mikulka, William Horn, Bill Frech, Helen Heinz, and Andre (Andy) Ahern, continued to support the Union and that Heinz "assumed that they [the Employer] thought that he [Mikulka] . . . [was engaging in distribution] during working time." Heinz gave no reason for her assumption, and there is no evidence that any other employee shared it. Contrary to the assertion in the Employer's brief, there is no evidence that "Mikulka and other employees believed . . . that Winnicki had been on work time." Mikulka's discipline did not name Winnicki, and it did not mention working time. Following his discipline on December 16, 2003, Mikulka did not distribute literature again until January 8, the day before the election. The discipline of Mikulka directly related to his union activity. The willingness of some employees to engage in the distribution of union literature following that discipline does not negate "the chilling and coercive effect" inherent in the discipline of an active union adherent. *Opryland Hotel*, 323 NLRB 723,732 (1997).

The Employer argues that its "technical violation" of Mikulka's rights was "de minimus." In determining whether a case falls within the "narrow exception" of de minimus conduct where "it is virtually impossible to conclude that the misconduct could have affected the election results," the Board has considered "the number of violations, their severity, the extent of dissemination, and the size of the unit," as well as "the closeness of the election." *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001).

In this case, the election was decided by two votes prior to the challenged ballots being counted, 11 votes after the challenges were withdrawn. The unit consists of approximately 323 employees, and there is no testimony rebutting the testimony of employee William Horn that the plant is like "a small town and talk runs rampant, good or bad." Prior to the critical period, the Employer had, on December 10, 2003, interfered with the right of employees to engage in protected Section 7 activity by threatening Mikulka with termination for distributing union literature. On December 16, 2003, the day after the representation petition was filed, Mikulka was disciplined. Numerous employees, 13 of whom are identified by name in the record, became aware that Mikulka had been disciplined for distributing union literature. Employees discussed the discipline at breaks, and employees who worked on second shift heard of the discipline when they reported to work. The Employer's conduct in unlawfully disciplining Mikulka was not de minimus standing alone. Furthermore, as discussed, it was accompanied by other objectionable conduct.

Objections 2 and 3 relate to an alleged rule change and reprisals. There are no complaint allegations relating to these objections. The Employer allows employees to wear union pins and buttons. The Employer has a uniform policy that provides that employees wear company issued clothing; however, the Employer permits employees who have not been issued company cold weather clothing to wear personal winter clothing "when it is severely cold." Employee Helen Heinz would wear a hooded sweatshirt to work when "it was so cold." The issue is whether the Employer's enforcement of its uniform policy in regard to prounion T-shirts on the day of the election constituted objectionable conduct.

In a prior union campaign in 2002, the Union had distributed yellow T-shirts bearing the UAW emblem in the center, just below the neckline. When worn under a uniform shirt, a portion of the emblem was visible. In 2004, the Union distributed blue T-shirts with the UAW emblem off center and thus not visible when worn under a uniform shirt. There is conflicting testimony regarding whether employees, in derogation of the uniform policy, wore the yellow T-shirts over their uniform shirts on the day of the election in 2002. Employees Andy Ahern, Bill Frech, Helen Heinz and William Horn all testified that they observed employees wearing the union shirts over their uniform shirts in 2002. Facilitator Calvin Kortman admitted that, at lunchtime in 2002, he noticed some employees wearing union T-shirts over their uniform shirts.

Manufacturing Manager Michael Zimmerman testified that he was unaware of any occasion upon which employees had been permitted to wear a T-shirt over the uniform. Stamping Manager Jeff Hughes testified that he was unaware of any employee wearing a T-shirt over a uniform shirt in 2002. In 2002, in addition to the yellow T-shirts bearing the UAW emblem, some employees obtained orange T-shirts bearing an antiunion message.

On January 9, the day of the 2004 election, Hughes observed employee Jeramiah Jerrad wearing one of the antiunion orange shirts from the prior campaign over his uniform. He asked him to remove it, and he did so. Hughes also observed employee Anthony Davis wearing a prounion T-shirt over his uniform. Hughes asked Davis to remove the shirt, and he did so. Thereafter, Davis came to Hughes and "apologized and said he did not mean any disrespect."

On January 9, Bill Frech and Helen Heinz wore the blue union T-shirts over their uniforms when they reported to work. Facilitator Kortman stated that it would "be best if they removed their T-shirts or put them under their company uniform." He then went to a meeting. When he returned, he informed Frech and Heinz that Manager Bonnie Tyler would soon be coming around and again told them that they should either remove the T-shirts or place them under their uniforms. Frech complied with the request and placed his union T-shirt under his uniform shirt. He then gave a written request for a "grace day," one of three annual personal days of absence which an employee may take without notice, to Kortman because "[i]t was just a bunch of hassle . . . people making you take your shirt off." Frech left. Heinz continued to wear the union T-shirt. Manager Tyler arrived and offered Heinz three options: she could take the shirt off, she could wear it under her uniform shirt, or she could go home and change and then return to work. Heinz asked if she could request a "grace day." Tyler informed her that she could not, that she had been asked to comply with the uniform policy and had refused. Heinz elected to leave and not return and thereby incurred a "point" against her attendance bonus.

Counsel for the Petitioner argues that the foregoing actions by the Employer constituted objectionable conduct, citing *Quantum Electric, Inc.*, 341 NLRB No. 146 (2004). I agree. In that case the Board concurred with the findings of the administrative law judge, "for the reasons stated in her decision, that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged employee Damir Tomas for wearing a T-shirt with union insignia and refusing to turn the T-shirt inside out." Id. slip op. at fn. 1. There was no complaint allegation that the clothing policy violated the Act. There was, as in this case, conflicting evidence regarding whether the policy was consistently enforced. There was no evidence of animus regarding the application of the policy. Nevertheless, the judge, as affirmed by the Board, found that the prohibition of the wearing of a T-shirt bearing the union's insignia violated the Act, reasoning as follows:

> [E]mployees have a right under Section 7 of the Act to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Absent "special circumstances," the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000). Respondent has not elucidated any special circumstances to justify the prohibition of employees' wearing union T-shirts. There is nothing to suggest the clothing policy is necessary to maintain production or discipline or to ensure safety. See id. The only possible special circumstance that might arguably apply is where display of union insignia may "unreasonably interfere with a public image which the employer has established as part of its business plan." *United Parcel Service*, 312 NLRB 596, 597 (1993). Respondent has not, however, presented evidence of that circumstance, and it cannot be inferred from the record, particularly where Respondent's employees do not normally interact with the public. Accordingly, Respondent violated Section 8(a)(1) of the Act when its supervisors directed Tomas to reverse his union-superscribed T-shirt on penalty of discipline. Id. JD slip op. at 11–12.

I am mindful that the Employer permitted employees to wear union pins, thus the prohibition regarding prounion T-shirts constituted only a partial ban upon protected union activity. In *Malta Construction*, 276 NLRB 1494 (1985), enfd. 808 F.2d 1003 (11th Cir. 1996), the employer permitted employees "to wear union insignia on articles of their personal attire," but prohibited union stickers on company issued hardhats. In finding a violation of the Act, the Board noted that the employer established no "special circumstances based on legitimate production or safety reasons to justify [the] prohibition." Id. at 1495.

The Employer articulated no "special circumstance" for its clothing policy. There is no evidence that the unit employees interact with the public. The Employer permits deviations from its policy by allowing employees who have not been issued cold weather clothing to wear personal winter clothing at their discretion when it is severely cold.

There is no evidence of a changed rule, only conflicting testimony regarding the consistency of the enforcement of the rule relating to the Employers uniform policy. Thus, the aspect of Objection 2 relating to a changed rule is overruled.

Undisputed evidence establishes enforcement of the uniform rule against four employees. The Employer's enforcement of its uniform rule interfered with the protected rights of those employees, and, as alleged in Objection 3, the union activities of three of those employees. The conduct was never repudiated. Following the direction by Manager Hughes that employee Davis remove his prounion T-shirt, he apologized and assured Hughes that he meant no disrespect. Employee Frech used one of his three "grace days" to avoid the "hassle." Employee Heinz, after being informed that she would not be permitted to take a grace day, chose not to comply with the Employer's instruction that contravened her right to engage in protected union activity and incurred a point against her attendance bonus. Although there was no changed rule, the Employer's actions were predicated upon its uniform policy and, and as found herein, enforcement of that policy did, as alleged in Objection 2, "discourage union activity" by requiring removal of prounion T-shirts. Whether the foregoing interference with employees' Section 7 rights constituted "reprisals" as alleged in Objection 3 is immaterial insofar as there is no complaint allegation and hence no basis for a make whole remedy.

I find that the foregoing instances of enforcement of the Employer's uniform policy on the day of the election interfered

with the Section 7 rights of employees and constituted objectionable conduct. The Petitioner's Objections 2 and 3 are sustained.

I find that the discipline of Stephan Mikulka, conduct coextensive with the Petitioner's Objections 1 and 4, occurred during the critical preelection period and interfered with the employees' free choice of representation. Objections 1 and 4 are sustained. The election must be set aside and a new election held.

## CONCLUSIONS OF LAW

1. By interfering with the right of employees to distribute protected union literature in nonworking areas when neither of the employees involved is on working time, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By disciplining Stephan Mikulka for distributing protected union literature in a nonworking area when neither Mikulka nor the recipient to whom he distributed the literature was on working time, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and post an appropriate notice. Notwithstanding the deficiencies in the Respondent's attempt to repudiate its conduct, it is undisputed that the discipline has been expunged from Mikulka's record. Thus, the Respondent need not be ordered to take an action that it has already taken. The notice should report that the rescission has occurred.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

## ORDER

The Respondent, Ogihara America Corporation, Howell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with the right of employees to distribute protected union literature in nonworking areas when neither of the employees involved is on working time.

(b) Disciplining employees for distributing literature in nonworking areas on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, when neither the employee distributing the literature nor the recipient is on working time.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility at Howell, Michigan, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS ALSO ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 7–RC–22589 is severed from Case 7–CA–47071 and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice.

Dated, Washington, D.C. July 12, 2004

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with your right to distribute protected union literature to your fellow employees in nonworking areas when none of you are on working time.

WE WILL NOT discipline you for distributing literature in nonworking areas on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, when you are not on working

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

time and the employees to whom you are distributing the literature are on nonworking time.

WE HAVE rescinded the unlawful discipline that we issued to Stephan Mikulka, and will not use that discipline against him in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

OGIHARA AMERICA CORPORATION